April 3, 2000

IN RE: DOCKET NO. 2000-040-C – E.SPIRE COMMUNICATIONS/BELLSOUTH ARBITRATION

COPY OF **SURREBUTTAL TESTIMONY** OF ALPHONSO J. VARNER FILED ON BEHALF OF BELLSOUTH HAS BEEN DISTRIBUTED TO:

PAO
Chief, McDaniel

PAO
Legal Dept. (1)

PAO
Exec. Director

PAO
Manager, Utilities Dept.

PAO
Audit (1)

PAO
Research (1)

PAO
Commissioners (7)

pao

Caroline N. Watson
General Counsel-South Carolina

Suite 821
1600 Hampton Street
Columbia, South Carolina 29201
803 748-8700
Fax: 803 254-1731

April 3, 2000

Hand delivered

The Honorable Gary E. Walsh
Executive Director
Public Service Commission of SC
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Petition by E.Spire Commununications, Inc. on behalf of Itself and its Operating Subsidiaries in South Carolina, for Arbitration of an Interconnection with BellSouth Telecommunications, Inc. Pursuant to the Communications Act of 1934, as Amended
Docket No. 2000-040-C

Dear Mr. Walsh:

Enclosed please find for filing in the above-referenced matter an original and twenty-five copies of the Surrebuttal Testimony of Alphonso J. Varner filed on behalf of BellSouth in the above-referenced matter.

Sincerely,

CN Watson

Caroline N. Watson

CNW/nml
Enclosure
cc: Russell B. Shetterly, Esquire
Florence P. Belser, Esquire
Brad E. Mutschelknaus, Esquire
Mr. Riley M. Murphy

BELLSOUTH TELECOMMUNICATIONS, INC.

SURREBUTTAL TESTIMONY OF ALPHONSO J. VARNER

BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2000-040-C

APRIL 3, 2000

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH") AND YOUR BUSINESS ADDRESS.

A. My name is Alphonso J. Varner. I am employed by BellSouth as Senior Director for State Regulatory for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS PROCEEDING?

A. Yes. I filed direct testimony in this proceeding on March 24, 2000.

Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?

A. The purpose of my surrebuttal testimony is to present BellSouth's position on several unresolved issues raised by e.spire Communications, Inc.'s ("e.spire") witness's, Mr. James Falvey, rebuttal testimony filed on March 29, 2000. Since the filing of Mr. Falvey's rebuttal testimony, the Parties have successfully resolved all but seven of the original 64 issues identified by the

Parties. I reserve the right, however, to file a supplemental response, if contrary to my understanding, these issues have not in fact been resolved. It is my understanding that the remaining unresolved issues are: Issues *5, 6, 7, 13, 54, 62, and 63*.

Issue 5 [Att. 1 §§ 1.69, 1.92, 1.99, 1.100; Att. 3 §§ 6.1.1, 6.1.2, 6.1.3, 6.10]: Should the definition of "local traffic" include dial-up calling to modems and servers of Internet Service Providers ("ISPs") located within the local calling area?

Q. PLEASE COMMENT ON MR. FALVEY's CONTENTION ON PAGE 6 THAT THE MARCH 24, 2000 ORDER ON REMAND OF THE FCC's DECLARATORY RULING BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT "SHOULD ALTER THE WAY THE COMMISSION ADDRESSES THIS ISSUE".

A. The D.C. Circuit Court's Order on Remand (*Bell Atlantic Telephone Cos. v. FCC*, No. 99-1094 D.C. Cir. Mar. 24, 2000) ("D.C. Circuit's Order") has no substantive impact on the issue of whether ISP-bound traffic is local or not. Findings on this subject in the FCC's Declaratory Ruling were not new; the FCC simply reiterated previous findings. For instance, since 1983 the FCC has exempted ISPs from the payment of certain interstate access charges. This exemption was adopted at the inception of the interstate access charge regime to protect certain users of access services, such as ISPs, that had been paying the generally much lower business service rates, from the rate shock that would

result from immediate imposition of carrier access charges. *See MTS/WATS Market Structure Order,* 97 FCC 2d at 715.

Also, the FCC's *Notice of Proposed Rulemaking*, In the Matter of Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket No. 87-215 ("1987 NPRM"), released July 17, 1987, in which the FCC proposed to lift the ESP access charge exemption, is clearly in keeping with the FCC's position on the interstate nature of ESP/ISP traffic. Paragraph 7 reads:

> *We are concerned that the charges currently paid by enhanced service providers do not contribute sufficiently to the costs of the exchange access facilities they use in offering their services to the public. As we have frequently emphasized in our various access charge orders, our ultimate objective is to establish a set of rules that provide for recovery of the costs of exchange access used in interstate service in a fair, reasonable, and efficient manner from all users of access service, regardless of their designation as carriers, enhanced service providers, or private customers. Enhanced service providers, like facilities-based interexchange carriers and resellers, use the local network to provide interstate services. To the extent that they are exempt from access charges, the other users of exchange access pay a disproportionate share of the costs of the local exchange that access charges are designed to cover.* (emphases added)

The resulting order in Docket No. 87-215 (the "ESP Exemption Order"),

released in 1988, is further evidence of the FCC's continued pattern of considering ISP-bound traffic to be access traffic. It referred to "certain classes of exchange access users, including enhanced service providers" (emphasis added). The D.C. Circuit's ruling impacts none of these orders.

Q. WHAT ARE THE IMPLICATIONS OF THE D.C. CIRCUIT's DECISION ON THIS ISSUE?

A. The D.C. Circuit did not find that the FCC's conclusions were erroneous. In its decision, the D.C. Circuit recognized that, under the FCC's regulations, reciprocal compensation is due on calls to the Internet if, and only if, such calls "terminate" at the ISP's local facilities. The D.C. Circuit held, however, that the FCC had not adequately explained its conclusion that calls to an ISP do not terminate at the ISP's local point of presence but instead terminate at a distant website. It therefore remanded the matter to permit the FCC to explain the point more fully.

The FCC has already indicated informally that it believes that it can provide the requested clarification and reach the same conclusion that it has previously — that is, that Internet-bound calls do *not* terminate locally. *See* TRDaily, *Strickling Believes FCC Can Justify Recip. Comp. Ruling in Face of Remand,* March 24, 2000 (stating that the Chief of the FCC's Common Carrier Bureau "still believes calls to ISPs are interstate in nature and that some fine tuning and further explanation should satisfy the court that the agency's view is correct").

Moreover, the FCC has *already* addressed in a different recent order one of the primary concerns expressed in the D.C. Circuit opinion. Specifically, the D.C. Circuit concluded that the FCC had not sufficiently explained in the order under review why Internet service constituted "exchange access" and not "telephone exchange service." At the same time the D.C. Circuit acknowledged that the "statute appears ambiguous as to whether calls to ISPs fit within 'exchange access' or 'telephone exchange service' and on that view any agency interpretation would be subject to judicial deference." *Order* at 15. The FCC, however, has explained in detail that calls to ISPs of the sort at issue here constitute interstate "exchange access" not "telephone exchange service." Order on Remand, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-413, 1999 WL 1244007, ¶ 43 (Dec. 23, 1999). The D.C. Circuit declined to consider that conclusion, however, because "[t]he Commission . . . did not make this argument in the ruling under review."

Finally, it is worth noting that the D.C. Circuit expressly stated that incumbents remain "free to seek relief from state-authorized compensation that they believe to be wrongfully imposed."

Contrary to Mr. Falvey's claim, the FCC's Declaratory Ruling was not the basis for the theory that ISP-bound traffic is largely interstate. This ruling simply reiterates what the FCC has historically said. The determination of jurisdiction via end points of communication originated in 1944 and was

reaffirmed in 1988, 1992, 1995, 1997 and 1999. The D.C. Circuit Court's Order on Remand could impact whether states can address this issue. The FCC's Declaratory Ruling is the only Order stating that states can address this issue in arbitrations. Indeed, BellSouth has always maintained that such delegation of authority was inappropriate, and that portion of the FCC's Declaratory Ruling is still on appeal before the D.C. Circuit. Since the Declaratory Ruling was vacated there is nothing that authorizes the states to address this issue.

Issue 6 [Att. 1§ 1.111; Att. 3 § 6.8.1]: Should the definition of "Switched Exchange Access Service" and "Switched Access Traffic" include Voice-over-Internet Protocol ("VOIP") transmissions?

Q. ARE VOIP TRANSMISSIONS OUTSIDE THE DEFINITION OF SWITCHED ACCESS TRAFFIC AS MR. FALVEY CONTENDS ON PAGE 8?

A. No. Mr. Falvey incorrectly assumes that VOIP transmissions are not included in the definition of switched access traffic. To the contrary and consistent with the FCC's definitions, "Access Service" includes services and facilities provided for the origination or termination of any interstate or foreign telecommunication. See 47 C.F.R § 69.2(a). Long distance telecommunications transported via VOIP transmissions, or any other technology, constitute switched access traffic. Clearly, VOIP transmissions are

included within the FCC's definition unless the FCC acts specifically to remove such transmissions.

Issue 7 [§ 1.113]: Should e.spire's local switch be classified as both a tandem and end office switch for purposes of billing reciprocal compensation?

Q. PLEASE COMMENT ON MR. FALVEY'S CONTENTION THAT THE FUNCTIONALITY OF THE SWITCH IS IRRELEVANT TO THIS ISSUE.

A. Mr. Falvey is wrong. His position is based on the preposterous view that the word "switch" in the FCC's Rule means any switch regardless of whether it performs the requisite functions. Aside from being illogical on its face, the FCC's First Report and Order, released August 8, 1996 ("Local Competition Order") clearly shows that Mr. Falvey's conclusion is incorrect. The FCC "concluded that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch". (Local Competition Order, at paragraph 1090) The Illinois Court also disagrees with Mr. Falvey. In deciding whether MCI was entitled to the tandem interconnection rate, the Illinois Commerce Commission applied a test promulgated by the FCC to determine whether MCI's single switch performed functions similar to, and served a geographical area comparable with, an Ameritech tandem switch. See *MCI Telecommunications Corporation and MCIMetro Access Transmissions Services v. Illinois Bell Telephone Company d/b/a Ameritech Illinois,* Docket No. 97-C-2225, 1999 U.S. Dist. LEXIS 11418 (N.D. Ill. 1999)

("MCI-Ameritech") A copy of the MCI-Ameritech decision is attached as Exhibit AJV-1 to my surrebuttal testimony. The MCI-Ameritech decision further found that the United States Supreme Court's decision in the AT&T Corp. v. Iowa Utilities Board case upheld the FCC's pricing regulations, including the "functionality/geography" test. *119 S. Ct. at 733.*

Q. ON PAGE 10, MR. FALVEY CONTENDS THAT NEITHER THE FCC's RULES NOR ORDER REQUIRES A "TWO-PRONGED" TEST FOR ENTITLEMENT TO THE TANDEM INTERCONNECTION RATE. PLEASE COMMENT.

A. Mr. Falvey quotes, in his opinion, the "pertinent part" of paragraph 1090 of the FCC's Local Competition Order, but chooses to ignore the fact that this paragraph references both "prongs" of the "two-pronged" test. In addition to the portion of the paragraph which Mr. Falvey highlights with italics regarding serving a comparable geographic area, he fails to emphasize the portion of that same paragraph that addresses that the states shall also consider whether the CLEC's switch performs "functions similar to those performed by an incumbent LEC's tandem switch…".

Q. ON PAGE 13, MR. FALVEY STATES THAT E.SPIRE USES THE SAME "LARGE AND CAPABLE" SWITCH AS ICG AND SHOULD THEREFORE BE ENTITLED TO COMPENSATION FOR TANDEM SWITCHING. PLEASE COMMENT.

A. The fact that e.spire uses a certain type of switch is irrelevant to the issue at hand. Furthermore, e.spire's deployment of a "SONET ring network architecture" has no bearing on the issue. The bottom line is that e.spire's switches simply do not perform the tandem function for local traffic. There is no trunk-to-trunk switching being performed by e.spire's switches.

Q. MR. FALVEY CONTENDS THAT THE FCC'S RULE DOES NOT REQUIRE E.SPIRE TO DEMONSTRATE HOW ITS CUSTOMERS ARE BEING SERVED BY ITS SWITCHES. DO YOU AGREE?

A. No. Actually, Mr. Falvey ignores the part of the FCC's rule that he previously contended was "pertinent". One of the conditions which must be met in order for the tandem switching rate to be applicable is to show that "the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch". Without the availability of information demonstrating that a carrier is serving a comparable geographic area, the application of the tandem switching function is not appropriate. e.spire has not made such a showing.

Q. ON PAGE 14, MR. FALVEY CONTENDS THAT THE MCI-AMERITECH DECISION SUPPORTS E.SPIRE'S POSITION REGARDING SWITCH FUNCTIONALITY. PLEASE COMMENT.

A. There was no finding by the Illinois Court that MCI's switch performed a comparable function to Ameritech's tandem switch. Instead, the Court simply

observed that Ameritech did not dispute the functionality of MCI's switch. In this arbitration proceeding, however, BellSouth is disputing the functionality of e.spire's switch. As such, Mr. Falvey's reference to the observation in the MCI-Ameritech decision is irrelevant.

Q. ON PAGE 15, MR. FALVEY CONTENDS THAT MCI WOULD HAVE PREVAILED AGAINST AMERITECH IF IT HAD PROVIDED "THE KIND OF EVIDENCE THAT E.SPIRE HAS PROVIDED IN THIS PROCEEDING". PLEASE COMMENT.

A. The fact is MCI provided the same kind of evidence provided by e.spire and the Court found that evidence insufficient. Specifically, the Court found: "MCI's argument has surface appeal, but fails under closer scrutiny. During arbitration, MCI had less than 50,000 customers in the Chicago area. The "Chicago area" is large, yet MCI offered no evidence as to the location of its customers within the Chicago area. Indeed, an MCI witness said that he 'doubted whether MCI had customers in every "wire center territory" within the Chicago service area." Order at *23. It is clear from the "evidence" that e.spire provided in its Exhibit 2 that e.spire's customers are concentrated in an area smaller than the geographic area served by a BellSouth tandem switch.

Q. ON PAGE 17, MR. FALVEY COMMENTS ON BELLSOUTH'S MAPS. HAS MR. FALVEY CORRECTLY INTERPRETED THE INFORMATION CONTAINED IN THE MAPS?

A. No. The maps included with my direct testimony show the serving area of each BellSouth tandem, not all of the tandems combined. As such, BellSouth's maps for Greenville and Columbia can be directly compared to the map e.spire provided. The results of such comparison clearly shows that e.spire's switch does not serve an area comparable to BellSouth's local tandem.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

#203550v2

1999 U.S. Dist. LEXIS 11418 printed in FULL format.

MCI TELECOMMUNICATIONS CORPORATION, a Delaware Corporation, and MCIMETRO ACCESS TRANSMISSION SERVICES, INC., a Delaware CORPORATION, Plaintiffs, v. ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, INC., an Illinois Corporation, the ILLINOIS COMMERCE COMMISSION; and DAN MILLER, RICHARD HOLHAUSER, RUTH KRETSCHMER, KARL McDERMOTT and BRENT BOHLEN, in their official capacities as Commissioners of the Illinois Commerce Commission, Defendants.

NO. 97 C 2225

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1999 U S Dist. LEXIS 11418

June 22, 1999, Decided

June 28, 1999, Docketed

DISPOSITION. [*1] Illinois Commerce Commission's decision of December 17, 1996 affirmed in part and reversed in part.

COUNSEL: For MCI TELECOMMUNICATIONS CORPORATION, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., plaintiffs: Terri Lynn Mascherin, Darryl Mark Bradford, Eric Andrew Sacks, Andrew Malen Spangler, Jr., David Charles Layden, Kristina Marion Entner, John J. Hamill, Jr., David Zev Smith, Jenner & Block, Chicago, IL.

For ILLINOIS BELL TELEPHONE COMPANY, defendant Theodore A. Livingston, Matthew Aloysius Rooney Christian Frederick Binnig, Dennis G. Friedman, Kira Elizabeth Druyan, Mayer, Brown & Platt, Chicago, IL.

For ILLINOIS BELL TELEPHONE COMPANY, counter-claimant: Theodore A Livingston, Matthew Aloysius Rooney, Christian Frederick Binnig, Dennis G. Friedman, Kira Elizabeth Druyan, Mayer, Brown & Platt, Chicago, IL.

For MCI TELECOMMUNICATIONS CORPORATION, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., counter-defendants: Terri Lynn Mascherin, Darryl Mark Bradford, Jenner & Block, Chicago, IL.

For UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, intervenor plaintiffs: AUSA, United States Attorney's Office, Chicago, IL.

For UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS [*2] COMMISSION, intervenor plaintiffs. Theodore C. Hirt, Jonathan T Foot, United States Department of Justice, Washington, DC.

Deborah A. Golden, AMERITECH CORPORATION, Chicago, IL.

Thomas R. Stanton, ILLINOIS COMMERCE COMMISSION, Chicago, IL.

JUDGES: Suzanne B. Conlon, United States District Judge.

OPINIONBY: Suzanne B. Conlon

OPINION: DECISION ON THE MERITS

MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, "MCI") sue Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc. ("Ameritech"), the Illinois Commerce Commission (the "ICC"), and five ICC commissioners in their official capacities under § 252(e)(6) of the Telecommunications Act of 1996 ("the Act"), *47 U.S.C. § 252*(e)(6). n1 Ameritech asserts a counterclaim against MCI and a cross-claim against the ICC and the individual commissioners under § 252(e)(6) of the Act.

n1 The Act is codified in scattered sections of Title 47 of the United States Code. Citations to sections of the Act are references to the corresponding sections of the Code.

[*3]

BACKGROUND

Historically, local telecommunications services were dominated by state-sanctioned monopolies granted to local exchange carriers such as Ameritech. H. R. Rep. No. 104-104, at 49 (1995) (hereafter, "H. Rep."). The Act imposes a scheme designed to end monopolies in local telecommunications services. The Act recognizes that incoming exchange carriers must be able to make use of the incumbent carrier's existing network in order to compete effectively. Id. The primary mechanisms for opening access to the incumbent carrier's network are found in §§ 251 and 252. Section 251 establishes three methods that the incoming exchange carriers may use to access the incumbent carrier's network. The first method, called "interconnection," allows incoming carriers to construct their own networks and interconnect with the incumbent carrier's facilities on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." *47 U.S.C. § 251*(c)(2). The second method requires incumbent carriers to provide incoming carriers with "nondiscriminatory access to network elements on an unbundled basis." Id at § 251(c)(3). However, the incumbent [*4] carrier need make available unbundled network elements only if the failure to provide access to the network element would "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." Id. at § 251(d)(2)(B). Finally, the Act allows "resale," by which incoming carriers may purchase the incumbent carrier's services at wholesale rates and resell the services to retail customers under a different brand name. Id. at § 251(c)(4).

Section 252 establishes the procedures for determining the terms under which incoming carriers will access the incumbent carrier's network. First, incumbent carriers must negotiate in good faith over the terms of interconnection, access to network elements, and resale. Id at §§ 251(c)(1) and 252(a)(1). If the parties reach a satisfactory agreement, any open issues are submitted to compulsory arbitration conducted by state public utility commissions. Id. at § 252(b). The state commissions are required to apply the substantive requirements of the Act and any implementing regulations in resolving open issues. Id. at § 252(c). Once an agreement has been reached through negotiation and arbitration, [*5] the proposed agreement must be submitted to the state commission for final approval. Id. at § 252(e)(1). A party who believes the state commission failed to properly apply the Act may seek judicial review of the commission's determinations. Id. at § 252(e)(6).

On March 26, 1996, MCI requested negotiations with Ameritech, the incumbent carrier, for access to Ameritech's network in the Chicago area. Def. Br. at Ex. 2, p. 1-2. On August 30, 1996, MCI filed a petition with the ICC for arbitration of unresolved issues. Pl. Br. at Ex. 6. Ameritech filed a timely response. Def. Br. at Ex. 2, p. 2. The ICC assigned a hearing examiner, who conducted an evidentiary hearing and issued a proposed arbitration decision. Id. Both MCI and Ameritech filed exceptions to the proposed decision. Id. On December 17, 1996, the ICC issued an arbitration decision. Id. On January 28, 1997, MCI presented a proposed interconnection agreement for the ICC's approval. Pl. Br. at 12; Def. Br. at 5 The ICC determined the proposed agreement could only be approved if it was amended in certain respects The parties submitted an amended interconnection agreement in accordance with the ICC's directives. [*6] Pl. Br. at Ex. 11.

MCI brings this action under § 252(e)(6) challenging specific aspects of the agreement. First, MCI contends the agreement does not require Ameritech to provide MCI with nondiscriminatory access to the network element "shared transport" or "common transport." n2 In order to fully understand MCI's claim, it is necessary to briefly describe the structure of the local telephone network n3 A telephone customer's home is connected to the network through wires called a "local loop." The local loop connects the customer's home to an "end office," which consists largely of a "local switch." The local switch serves a routing function - it reads the telephone number dialed by the customer and, based on programmed instructions, directs the call on a transmission path to its final destination. If the party receiving the call is connected to the same end office as the caller, the local switch connects the call directly However, if the caller and the receiving party are connected to different end offices, the call must be "transported" from one end office to another. End offices are connected to one another by "interoffice transmission facilities," which generally consist of [*7] fiber-optic cables capable of carrying hundreds of calls at once. End offices are also connected to "tandem switches" by a type of interoffice transmission facility called a "trunk." Tandem switches are connected to numerous end offices in a hub-and-spoke arrangement, and connect end offices that are not directly connected. MCI's request for "shared transport" refers to Ameritech's interoffice transmission facilities.

n2 The precise meanings of these terms are disputed, as explained below.

n3 The following description of a local telephone network is gleaned from the parties' briefs and from statements at oral argument. Because these foundational facts are not in dispute, the court will forego cumbersome citations to the record.

Although Ameritech agreed to provide MCI with "shared transport," the parties could not agree on the meaning of that term. Ameritech argued that "shared transport" refers only to interoffice transmission facilities purchased on a dedicated basis and shared by other carriers or customers, [*8] but not the incumbent carrier. MCI argued that "shared transport" refers to interoffice facilities shared by customers and other carriers including the incumbent - what the industry refers to as "common transport." At the heart of the parties' dispute is the interpretation of "shared transport" as used by the Federal Communications Commission (FCC) in 47 C.F.R. § 51.319 ("Rule 319"). The ICC determined the FCC regulations were ambiguous. Pl. Br. at Ex. 7, p. 28. Accordingly, the ICC concluded MCI was entitled to shared transport as defined by Ameritech, but MCI could seek access to common transport only through a bona fide request process set out in the interconnection agreement. Id. at Ex. 7, p. 29. MCI contends the ICC violated the Act by requiring it to submit to a lengthy request process in order to gain access to common transport.

MCI's second claim concerns the Act's requirement that local exchange carriers "establish reciprocal compensation arrangements for the party's transport and termination on telecommunications." *47 U.S.C. § 251*(b)(5). In other words, MCI must pay Ameritech a fee when an MCI customer calls an Ameritech customer, and Ameritech [*9] must pay MCI a fee when an Ameritech customer calls an MCI customer. MCI argued before the ICC that it was entitled to the "tandem interconnection rate" set out in the interconnection agreement. However, the ICC determined that MCI was entitled only to the lower "end office switching rate," concluding that MCI had failed to produce sufficient evidence showing it should be paid the higher rate. MCI contends the ICC decision violates § 251(c)(2)(D), which requires that reciprocal compensation be paid on just, reasonable, and nondiscriminatory terms.

MCI asserts in its third claim that the ICC violated § 251(c)(3) when it accepted Ameritech's proposal regarding the amount of time allowed for Ameritech to provide MCI access to local loops. MCI's proposal gave Ameritech two to five days, depending on the number of requests. Ameritech proposed a five to seven day period. The ICC accepted Ameritech's proposal.

MCI's fourth claim is that the ICC imposed unjust, unreasonable, and discriminatory terms on MCI when it approved Ameritech's proposal for a bona fide request process. The bone fide request process is the vehicle by which MCI may request access to additional network elements. [*10] Ameritech proposed a request procedure that could take up to four months to conclude. MCI's proposal involved a significantly shorter time period. According to MCI, Ameritech's proposal needlessly and intentionally delays MCI's access to necessary network elements.

Finally, MCI claims the ICC erred when it approved provisions limiting Ameritech's liability to MCI for breaches of the interconnection agreement. The liability limitations were never a subject of arbitration. Instead, the ICC imposed the provisions at Ameritech's request during the approval stage of the negotiation and arbitration process. According to MCI, the ICC had no authority under § 252(e)(2) to impose the liability limitations at that point in the process. MCI also contends the liability limitations violate § 251(c) because the provisions are not just, reasonable, and nondiscriminatory.

Ameritech's counterclaim arises from the ICC's decision to grant MCI access to "dark fiber." Dark fiber is simply optical fiber that has been physically placed in the network but is not attached to electronics that are necessary to "illuminate" the fiber and enable it to carry telecommunications. n4 Ameritech contends the ICC [*11] had no authority to grant MCI access to dark fiber because the issue was never submitted to the ICC in arbitration. Ameritech next argues the ICC had no authority to identify dark fiber as a network element after the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999)* (hereafter, "IUB"). Finally, Ameritech argues that even if the ICC had authority to grant MCI access to dark fiber, its decision violated the Act because the ICC failed to determine that denial of access to MCI would impair MCI's ability to provide telecommunications services, as required by § 251(d)(2)(B).

n4 As explained at oral argument, dark fiber is used to save resources. The process of burying cable in the ground or suspending it along poles is very expensive. Therefore, when an exchange carrier lays new cable in the network, it frequently lays more cable than is required. The excess cable is dark fiber, which can be activated if additional carrying capacity is needed.

[*12]

DISCUSSION

The parties agree that the applicable standard of review of the ICC's decisions depends on whether a particular issue is one of fact or of law. Determinations of fact are entitled to substantial deference unless they are arbitrary and capricious. Questions of law are subject to de novo review.

I. Shared Transport

In the preliminary negotiations between Ameritech and MCI Ameritech agreed to provide MCI access to interoffice transport facilities on a "shared" basis. n5 At arbitration, the parties disputed the meaning of the word "shared," and looked to Rule 319 for the appropriate definition. Def. Supp. Br. at 6. The ICC concluded Rule 319 was ambiguous, and ultimately adopted Ameritech's proposed contract language. n6 The ICC ruled that if MCI wanted access to common transport, it could seek access through the bona fide request process. After the ICC reached its decision, the FCC issued its Third Reconsideration Order, which left no doubt that "shared transport" under Rule 319 encompassed the industry understanding of "common transport." The FCC explained that incumbents must offer access "to the same interoffice transport facilities that [*13] the incumbent uses for its own traffic." Pl. Br at Ex. 4, P 22. The Third Reconsideration Order also amended the text of Rule 319 to expressly include the concept of common transport within the meaning of the term "shared." MCI argues that the Third Reconsideration Order clearly indicates the ICC's decision was erroneous. n7

n5 Although Ameritech has not expressly admitted this assertion, MCI has repeatedly advanced the argument. See Supp. Resp. at 2; Tr. Apr. 15, 1999 at 9-10. Ameritech has not challenged MCI's position.

n6 The ICC's decision was a determination of law, and therefore is subject to de novo review.

n7 Ameritech argues that this court should not consider the Third Reconsideration Order after the Supreme Court's order in *Ameritech Corp v. FCC, 119 S Ct. 2016, 143 L. Ed. 2d 1029, 1999 WL 116994 (U.S. 1999)* Ameritech Corp vacated the Eighth Circuit's decision in *Southwestern Bell Tel. Co. v. FCC, 153 F.3d 597 (8th Cir. 1998)*, which affirmed the Third Reconsideration Order However, Ameritech Corp. did not vacate the Third Reconsideration Order, nor did it instruct the Eighth Circuit to do so. The Supreme Court merely vacated the judgment and remanded for further consideration in light of *IUB. Ameritech Corp., 119 S Ct. 2016, 143 L. Ed. 2d 1029, 1999 WL 116994 (U.S. 1999)*. The Third Reconsider Order is still valid.

[*14]

Ameritech responds that because Rule 319 was vacated by the Supreme Court in IUB, there is no basis for reversing the ICC's decision. But the vacation of Rule 319 is irrelevant to the question before this court. MCI need not look to Rule 319 for the authority to compel Ameritech to provide access to shared transport, because Ameritech agreed to do so in preliminary negotiations. Rule 319 merely serves as an external source of definition of the terms in the negotiated interconnection agreement. IUB has no effect on the function of Rule 319 in this case. n8

n8 If the continued vitality of Rule 319 were necessary to compel Ameritech to provide access to shared transport, Ameritech presumably would challenge its obligation to provide MCI access to any type of "shared transport," however that term is defined. The fact that Ameritech challenges only its obligation to provide common transport bolsters the conclusion that Ameritech's obligation to provide shared transport stems from the preliminary negotiations rather than from Rule 319.

[*15]

Ameritech also argues that MCI failed to exhaust its administrative remedies because it did not seek common transport through the bona fide request process recommended by the ICC. But the basis of MCI's claim is that it should not have to undergo the bona fide request process in order to gain access to common transport. Ameritech seeks to bootstrap its way out of MCI's claim by assuming that the ICC's decision to require MCI to undertake a bona fide request is valid. Ameritech's argument is without merit.

Finally, Ameritech contends that the Third Reconsideration Order changed existing law, and that MCI must therefore pursue its remedies under § 29.3 of the interconnection agreement. Section 29.3 provides:

In the event of . . . any final and nonappealable legislative, regulatory, judicial order, rule or regulation or other legal action that revises and reverses . . . the FCC's First Report and Order (which promulgated Rule 319] . . either party may . . . require that the affected provisions be renegotiated in good faith and this

agreement be amended accordingly.

Pl. Br. at Ex. 11, § 29.3. But the Third Reconsideration Order did not change [*16] Rule 319 as that Rule relates to the present issue. The Third Reconsideration Order merely clarified the definition of "shared transport" already contained in Rule 319. As the FCC made clear in the Introduction to the Third Reconsideration Order, "the [First Report and Order] required incumbent [exchange carriers] to provide requesting carriers with access to the same transport facilities . . . that incumbent [exchange carriers] use to carry their own traffic." Pl. Br. at Ex. 4, P 2 (emphasis added). In discussing the issue in depth, the FCC stated:

> Some parties have argued that certain aspects of the rules adopted last August were ambiguous which, in our view, were clear. Specifically, in the [First Report and Order], we expressly required incumbent [exchange carriers] to provide access to transport facilities "shared by more than one customer or carrier." The term "carrier" includes both an incumbent [exchange carrier] as well as a requesting telecommunications carrier. We, therefore, conclude that "shared transport," as required by the [First Report and Order] encompasses a facility that is shared by multiple carriers, including the incumbent [*17] [exchange carrier.]

Id. at Ex. 4, P 22 (citing 47 C.F.R § 51 319) (emphasis added). The above quotation makes clear that Rule 319's definition of shared transport, as it existed at the time of the ICC's decision, encompassed the concept of common transport.

One might argue, of course, that the ICC was correct in its conclusion that Rule 319 was ambiguous. Even assuming the ICC was correct, there is no need to force MCI to undergo a lengthy bona fide request process. The ICC emphasized that it was "unwilling to conclude that the FCC . . . intended to preclude the provision of 'common transport' as a network element." Pl. Br. at Ex. 7, p. 28. Indeed, the ICC deferred any final resolution of the question until MCI filed a bona fide request so as "to enable the Commission to evaluate the competing contentions of the parties within a more meaningful context." Id. at Ex. 7, p. 29. In other words, the ICC indicated it could not determine the meaning of "shared transport" under Rule 319 on the evidence and arguments before it. The question left open by the ICC has since been answered in the Third Reconsideration Order. To force MCI to undertake a [*18] bona fide request would unjustifiably delay MCI's access to common transport. Delaying access to a network element to which MCI is clearly entitled is inconsistent with the basic purpose of the Act.

Accordingly, the ICC's decision denying MCI access to shared transport without undertaking a bona fide request is reversed.

II. Tandem Interconnection Rate

The Act requires a local exchange carrier to pay mutual and reciprocal compensation for the cost of transporting and terminating calls on another carrier's network. *47 U.S.C. §§ 251*(b)(5), 252(d)(2). A variety of methods has been proposed for determining the rates one carrier may charge another. Pl. Br. at 23 (and citation therein). One aspect of the rates the ICC imposed in the Ameritech / MCI interconnection agreement is the "tandem interconnection rate." Id. The tandem interconnection rate is a function of other rates set out in the agreement, including the tandem switching rate, a charge for transport and termination, and the end office switching rate Id. The tandem interconnection rate is higher than the "end office rate," which includes only the end office switching rate and a [*19] charge for transport and termination. Id.

In deciding whether MCI was entitled to the tandem interconnection rate, the ICC applied a test promulgated by the FCC to determine whether MCI's single switch in Bensonville, Illinois, performed functions similar to, and served a geographical area comparable with, an Ameritech tandem switch. n9 Id. at 23-24. The ICC determined that MCI was entitled only to the end office rate. MCI contends the ICC's decision imposes reciprocal compensation on terms that are unjust and unreasonable in violation of § 251(c)(2)(d). Because the parties agree that the ICC applied the proper legal standard, its decision rests on factual determinations that are reviewed under an arbitrary and capricious standard.

> n9 MCI contends the Supreme Court's decision in IUB affects resolution of the tandem interconnection rate dispute. It does not. IUB upheld the FCC's pricing regulations, including the "functionality / geography" test. *119 S Ct. at 733.* MCI admits that the ICC used this test. Pl. Br. at 24. Nevertheless, in its supplemental brief, MCI recharacterizes its attack on the ICC decision, contending the ICC applied the wrong test. Pl. Supp. Br. at 7-8. But there is no real dispute that the ICC applied the functionality / geography test; the dispute centers around whether the ICC reached the proper conclusion under that test

[*20]

The ICC did not make express findings regarding the comparable functions of MCI's switch and Ameritech's switches or the comparative geographical areas served by the various switches. However, the ICC did discuss the evidence offered by each party on these issues, and concluded from the "totality of the evidence" that MCI had failed to establish it was entitled to the tandem interconnection rate. Pl. Br. at Ex. 7, p. 12. The issue of comparable functionality apparently was not in serious dispute. MCI presented evidence and arguments that its switch served to aggregate calls that could then be distributed to any MCI customer within the switch's service area, and that Ameritech's tandem switches served the same function. Id. at Ex. 7, p. 10. Ameritech offered no counter-arguments to the ICC, nor does it offer any to this court. See Id. at Ex. 7, p. 11 (discussing Ameritech's arguments and evidence only as to the question of geographical area); Def. Resp. at 23-25. Therefore, only at issue is the geographical areas served by the respective switches. The ICC summarized MCI's evidence regarding the geographical area served by its switch as follows:

MCI maintains that its [*21] switch in Bensonville, Illinois serves a geographical area comparable to the area served by [Ameritech's] tandem switch. MCI is authorized to provide local exchange service in the Chicago [service area.] MCI plans to use it Bensenville switch to provide service to any customer in the Chicago [service area] where such service is feasible. [Ameritech] currently serves the Chicago [service area] with three tandem switches . . . Thus, MCI claims that its switch covers approximately the same geographic area as three . . . Ameritech tandem switches.

Id. at Ex. 7, p. 10 (emphasis added). As the highlighted portions of the quotation make clear, much of MCI's evidence focused on the company's intentions for its switch, which of course are irrelevant to the question whether the switch is capable of servicing the area as intended. However, MCI argued that because its switch currently served the entire Chicago area - the same area that Ameritech served with three tandem switches -- its switch must serve an area comparable to any one of Ameritech's switches.

MCI's argument has surface appeal, but fails under closer scrutiny. During arbitration, [*22] MCI had less than 50,000 customers in the Chicago area. Id. at Ex. 7, p. 11. The "Chicago area" is large, yet MCI offered no evidence as to the location of its customers within the Chicago area. Indeed, an MCI witness said that he "doubted" whether MCI had customers in every "wire center territory" within the Chicago service area. Pl. Br. at Ex. 28, p. 207. MCI's customers might have been concentrated in an area smaller than that served by an Ameritech tandem switch. Or MCI's customers might have been widely scattered over a large area, which raises the question whether provision of service to two different customers constitutes service to the entire geographical area between the customers. n10 These are questions that MCI could have addressed, but did not. The ICC compared MCI's proof with the proof offered by an incoming exchange carrier in a different case, noting that the other carrier produced "a map showing geographically widespread deployment of various nodes in its network" and "some discussion of the location of [the carrier's] local exchange customers." Id. at Ex. 7, p. 12. In contract, MCI had expressly refused to provide "specific empirical data, including maps, [*23] to demonstrate that it serves an area comparable to Ameritech's tandem network." Id. at Ex. 21, p. 13. In short, MCI offered nothing but bare, unsupported conclusions that its switch currently served an area comparable to an Ameritech tandem switch or was capable of serving such an area in the future. The ICC's determination that "MCI has not provided sufficient evidence to support a conclusion that it is entitled to the tandem interconnection rate" was not arbitrary and capricious.

n10 MCI argues that it is patently unfair to look to the number of customers served by the switch, since Ameritech, as a long time beneficiary of a state-sanctioned monopoly, will almost always have more customers than incoming exchange carriers. However, nothing in the ICC's opinion indicates that it improperly relied on the number of MCI customers in reaching its decision. Furthermore, as the discussion in the text makes clear, identification of MCI customers is relevant to the question of the location of the customers and the geographical area actually serviced by MCI's switch.

[*24]

III. Timing of Connections to Local Loops

"Local loops" are the portions of the network connecting the exchange carrier's end office or switch to the customer's premises. Ameritech submitted to the ICC a proposal allowing Ameritech five to seven days to provide MCI with local loops. MCI's proposal allowed Ameritech two to five days to provide local loops. MCI contends the ICC violated the Act by adopting Ameritech's proposal. MCI argues that the time required to obtain local loops is critical because it determines how long a customer must wait before being switched to MCI's service. During the change-over in-

terval, MCI contends the customer will be subjected to Ameritech's targeted efforts to win back the customer. According to MCI, the ICC's decision violates *47 U.S.C. § 251*(c)(3), which requires an incumbent carrier to provide unbundled network elements on "just, reasonable, and nondiscriminatory" terms, and 47 C.F.R. § 51.313 ("Rule 313"), which requires an incumbent carrier to provide access to network elements on terms "no less favorable" than the terms under which the incumbent carrier provides the elements to itself. n11

n11 In its reply, MCI argues that § 51.311(b) ("Rule 311"), which requires that elements given an incoming carrier must be "equal in quality" to the elements the incumbent carrier supplies itself, also applies to timing of access to local loops. But Rule 313 specifically refers to "the time within which the incumbent [exchange carrier] provisions such access to unbundled network elements," while Rule 311 refers generally to the "quality" of access to unbundled network elements. Rule 313 provides the applicable standard for determining whether the ICC's acceptance of Ameritech's proposal is permissible under the Act.

[*25]

Rule 313(b) provides,

Where applicable, the terms and conditions pursuant to which an incumbent [exchange carrier] offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent [exchange carrier] provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent [exchange carrier] provides such elements to itself.

47 C.F.R. § 51.313(b). For present purposes, the most important phrase in Rule 313 is the qualifier "where applicable." This phrase makes the "no less favorable" standard conditional on the applicability of the regulation. The difficult question is whether the incoming carrier bears the burden of demonstrating the regulation applies, or whether the incumbent carrier bears the burden of demonstrating the regulation does not apply. In this court's view, the regulation places the burden on the incoming carrier. In understanding this conclusion, it is helpful to contrast Rule 313 with the closely analogous Rule 311. Rule 311 requires incumbent carriers to provide incoming carriers [*26] access to network elements "equal in quality" to the access the incumbent carrier provides to itself. 47 C.F.R. § 51.311(b). However, the incumbent carrier is held to this strict standard only when it is "technically feasible" to provide access of equal quality. Id. If the incumbent carrier does not provide access meeting the requisite standard, Rule 311 unequivocally places the burden of demonstrating technical infeasibility on the incumbent carrier - "the incumbent carrier must prove to the state commission that it is not technically feasible . . ." Id. Rule 311 demonstrates that in crafting the rules regarding parity of access to network elements, the FCC carefully considered which party should bear the burden of proof. Rule 311 also demonstrates that the FCC chose when to place that burden on the incumbent carrier. Yet Rule 313, a companion to Rule 311, contains no comparable language placing the burden on the incumbent; Rule 313 simply mandates provisioning intervals to be congruent "where applicable." The sharp contrast between the language of these two closely analogous rules indicates the FCC did not intend that the incumbent carrier bear the burden of showing [*27] Rule 313 is inapplicable.

This conclusion comports with common sense when one considers the differences between the quality of access addressed in Rule 311 and the timing of access addressed in Rule 313. In considering quality of access, it is difficult to imagine a situation in which an incumbent carrier could not provide incoming carriers access to network elements equal in quality to that the incumbent provides itself. The quality of access presumably is a function of the technologies, services, and physical facilities that comprise the network element. There is no apparent reason why the quality of the technologies, services, or physical facilities would decline simply because the facilities are to be used by a different telecommunications carrier. Therefore, Rule 311 properly forces the incumbent to prove it cannot provide access equal in quality to that which it provides itself. But the timing of access to network elements presents an entirely different situation. As Ameritech points out, it does not unbundle local loops, or any other network element, for its own use. See Def. Resp. at 28. The process of providing access to unbundled network elements to competing carriers [*28] that often operate on a different network is different, and presumably more time-consuming, than the process of provisioning network elements for the incumbent's own use. MCI's witness recognized there are differences between processing orders for unbundled network elements and processing orders for retail services. Def. Resp. at Ex. 15, p. 155; Pl. Br. at Ex. 7, p. 57. Of course, some network elements might be provided to incoming carriers through the same processes through which the incumbent carrier supplies itself. Rule 313 logically places the burden on incoming carriers to demonstrate that the incumbent

carrier can provide unbundled elements to the competing carrier in the same time frame that the incumbent provides elements to itself.

The ICC concluded MCI did not sufficiently demonstrate that Ameritech could feasibly provide access to local loops in two to five days. n12 MCI admitted that its pleadings in the arbitration proceedings lacked data supporting its proposal. Def. Resp. at Ex. 15, p. 180. MCI merely argued that Ameritech should be forced to provide access to unbundled local loops in a comparable amount of time to that required to provide local loops for resale. Pl. [*29] Br. at Ex. 7, p. 57. The ICC stated that "MCI does little more than point to its own proposals and allege in the most general of terms that they are necessary for 'parity' or 'nondiscrimination' or that [Ameritech's] proposals are 'inadequate.'" Pl. Br. at Ex. 7, p. 62. The ICC concluded that "MCI's claims regarding provisioning benchmarks mix apples and oranges" because the "procedures for provisioning an unbundled loop and a resale loop are different and the respective provisioning intervals are not comparable." Id. The ICC's decision was not erroneous under Rule 313.

n12 The ICC's decision is a mixed determination of law and fact, and is subject to de novo review.

IV. Timing of Bona Fide Request Process

Both MCI and Ameritech presented the ICC with proposals for a "bona fide request" process by which MCI could request access to additional network elements not specified in the interconnection agreement. MCI proposed an 85-day process, while Ameritech proposed 120 days. MCI's proposal allowed [*30] Ameritech fifteen days from the time of the request to determine if the request was technically feasible. Pl. Br. at 33 (and citations therein). If Ameritech determined the request was technically feasible, it would provide MCI a price quote within an additional twenty business days. Id. MCI would then have thirty days to accept or reject the quote. Id. In the event of a dispute, the ICC would decide within twenty days of Ameritech's response whether Ameritech should be required to provide the element. Id. at 34. Ameritech proposed a more lengthy process. Under Ameritech's plan, Ameritech would have thirty days to evaluate whether a request was required by the Act and, if so, whether the request was technically feasible. Def. Br. at 32 (and citations therein). If Ameritech determined the request was feasible, it then would have ninety days to prepare a quote that includes a complete product description, proposed rates, ordering intervals, methods and procedures for ordering the requested item, and a statement of Ameritech's development costs. Id. Ameritech also agreed to completely process certain less complicated bona fide requests within thirty days of receipt. [*31] Id. MCI would have thirty days to accept or reject the quote, or to seek a remedy under the dispute resolution terms of the interconnection agreement. Pl. Br. at 34 (and citations therein). Dispute resolution could occupy as much as an additional thirty days. Id. Under Ameritech's plan, Ameritech would not be required to provide unbundled network elements until more than four months after MCI's initial request. Id. The ICC ultimately rejected MCI's proposal and adopted Ameritech's proposal. MCI claims the ICC violated § 251(c)(3) of the Act because Ameritech's proposal was not "just, reasonable, and nondiscriminatory."

In support of its position, MCI relies heavily on a statement in a report of the House of Representatives that the Act was designed to promote competition in local telecommunications markets "as quickly as possible." See H. Rep. at 89. According to MCI, the ICC applied a "commercial reasonableness" standard to the bona fide request issue. n13 Pl. Rep. at 16. MCI contends the commercial reasonableness standard is inconsistent with the purpose of the Act because it allows the ICC to approve a procedure that does not resolve disputes as quickly as [*32] possible. MCI goes so far as to say that "a [bona fide request] provision cannot, as a matter of law, satisfy the 1996 Act unless it is as short as possible." Pl. Rep. at 17 (emphasis added). MCI's argument proves too much, and demonstrates that the statement in the House Report cannot be taken literally. It would be possible to resolve bona fide requests in a matter of days or weeks by requiring all parties to immediately dedicate their full attention and resources to the problem. But such a requirement is neither practical nor reasonable. MCI implicitly recognizes that it is not entitled to resolution "as quickly as possible" in its own proposal, which allows a maximum time of eighty-five days. The statement in the House Report reflects a general policy or purpose of the Act, but it does not mean that a bona fide request provision cannot satisfy the Act as a matter of law unless the resolution period is as short as possible. Nor does the statement in the House Report override the plain language of the Act, which requires access to network elements on terms that are just, reasonable, and nondiscriminatory. MCI's attempt to read an "as quickly as possible" [*33] standard into § 251(c)(3) of the Act does not comport with common sense, the plain language of the statute, or MCI's own proposal. The ICC applied an appropriate analysis

n13 Apparently, the ICC did not expressly articulate the commercial reasonableness standard, but cited with approval another interconnection arbitration decision that applied the standard. Pl. Rep. at 16.

Having determined that the ICC did not apply an erroneous standard to the issue of the bona fide request process, the court must now determine whether the ICC's factual determination that Ameritech's proposal was more commercially reasonable than MCI's was arbitrary or capricious. MCI argues that Ameritech failed to adduce evidence sufficient to support a finding that the four month period was reasonable. But Ameritech presented the ICC with ample evidence sufficient to support the conclusion that Ameritech's proposal was commercially reasonable. Ameritech presented evidence regarding the unpredictable number, timing, and complexity of [*34] the bona fide requests it receives from various competing exchange carriers. Def. Br. at 34-35 (and citations therein). Ameritech also presented evidence regarding similar time frames approved by the FCC and other state commissions in analogous situations. Id. at 35-36. In contrast with Ameritech's presentation, MCI presented little evidence in support of its own proposal. MCI's witness conceded that MCI did not do "any type of empirical analysis of the processes, resources, [or] costs" that Ameritech might incur in responding to bona fide requests, but instead "worked backwards" from Ameritech's 120-day proposal. n14 Def. Resp. at Ex. 23, p. 593. The ICC's determination that Ameritech's proposal was the more reasonable of the two plans was not arbitrary and capricious.

n14 Significantly, MCI presents nothing to this court in defense of its plan. MCI merely attacks Ameritech's proposal as unjust, unreasonable, and discriminatory.

MCI also presents, in a footnote, an argument that Ameritech's proposal [*35] is discriminatory in violation of § 251(c)(3). Pl. Br. at 37, n. 10. MCI contends that § 251(c)(3) requires Ameritech to provide network elements to MCI on the same terms and conditions that it provides the elements to itself. According to MCI, the bona fide request provision is discriminatory because it forces MCI to wait for access to Ameritech's network elements longer than Ameritech must wait. But the "nondiscriminatory" language of § 251(c)(3) has no application here. To say that MCI is entitled to nondiscriminatory access to network elements presupposes that MCI is entitled to any access to the elements. MCI is not entitled to access to network elements beyond those provided for in the interconnection agreement until it successfully completes the bona fide request process. The purpose of the bona fide request process is to determine whether, and on what terms, Ameritech is required to provide access to additional network elements not addressed in the interconnection agreement. Only after MCI obtains the right to access additional network elements through the bona fide request process does § 251(c)(3) forbid nondiscriminatory access to those elements. [*36]

V. Limitations of Liability

The Act contemplates two distinct functions of state public utilities commissions. First, state commissions conduct arbitration pursuant to § 252(b)(1). Second, state commissions evaluate negotiated or arbitrated agreements against the standards set out in § 252(e)(2) and either approve or reject the agreement. At the approval stage, the state commission's authority is limited to determining whether the agreement meets the requirements of § 252(e)(2). See e.g., *TCG Milwaukee, Inc. v. Public Serv. Comm'n of Wisconsin, 980 F. Supp. 992, 999 (W.D. Wis. 1997)*. It is undisputed that liability limitations were not considered until the approval stage; MCI and Ameritech did not agree on liability limitations during preliminary negotiations, nor did they arbitrate the issue. Therefore, unless Ameritech prevails on one of its arguments in support of the ICC's decision to incorporate liability limitations into the agreement, the limitations must be stricken. The court reviews the ICC's decision de novo.

Ameritech first argues that the ICC's decision was appropriate under § 252(e)(3), which allows state commissions to enforce requirements [*37] of state law in reviewing an agreement. In support of its assertion, Ameritech cites *In re Illinois Bell Switching Station, 161 Ill. 2d 233, 641 N.E.2d 440, 448-49, 204 Ill. Dec. 216 (Ill. 1994)*. But Illinois Bell does not establish a state law requiring limitations on Ameritech's liability. In Illinois Bell, a single justice of the Illinois Supreme Court states that limitations of liability are an "important part" of a utility company's contracts. *641 N.E.2d at 449* (Miller, J., concurring). This unremarkable statement does not even suggest that limitations of liability must be included in a utility company's contracts. Ameritech's argument is without merit.

Ameritech next contends the ICC was required to include liability limitations under § 252(e)(2)(B) because without the limitations, the pricing provisions of the agreement would violate the standards of § 252(d). Section 252(d) requires that prices set out in intercon-

nection agreements must be based on the incumbent carrier's costs of providing the network elements at issue. According to Ameritech, the prices in the interconnection agreement would not accurately reflect Ameritech's costs unless Ameritech's [*38] liability was limited. Ameritech initially contended that its liability exposure was a component of its costs. See Def. Resp. at 41-42. However MCI correctly argued the Act mandates that prices be set according to forward-looking costs, and not according to a rate-of-return analysis. *47 U.S.C. § 252*(d)(1)(A)(ii); see also, 47 C.F.R. § 51.105. Under the Act's pricing scheme, the cost of Ameritech's liability to MCI is not recoverable in the prices of unbundled network elements. Recognizing this difficulty, Ameritech changed its strategy and now argues that the liability limitations represent the cost of "gold-plating" Ameritech's network to ensure the network will not fail. Def. Supp. Resp. at 5-6 But the costs of gold-plating the network and the costs of liability are two sides of the same coin. The costs of gold-plating a network element are extraordinary costs incurred solely to avoid liability, and are otherwise unrelated to the cost of producing or supplying the network elements. It is incongruous to say that Ameritech may not charge MCI for the additional cost of Ameritech's liability to MCI, but may charge MCI for the additional cost of avoiding [*39] that liability. The pricing regulations do not allow Ameritech to recover the cost of gold-plating through the prices it charges MCI.

Ameritech next argues that the ICC was authorized to impose liability limitations under § 252(e), which permits state commissions to reject agreements that discriminate against carriers that are not parties to the agreements. All of Ameritech's interconnection agreements with incoming carriers in Illinois contain liability limitations similar to those Ameritech proposed to the ICC in this case. Ameritech argues that if the ICC approved the MCI agreement without limiting Ameritech's liability, the agreement would discriminate against other Illinois carriers. Ameritech's argument proves too much. Under Ameritech's view of the Act, any provision in an interconnection agreement that is favorable to the incoming carrier is impermissible unless that provision is contained in all the incumbent's other interconnection agreements. Taking Ameritech's argument to its absurd extreme, every interconnection agreement within a region must be identical. Furthermore, the template for all subsequent interconnection agreements would be established by the first incoming [*40] carrier to negotiate with the incumbent. This result would be at odds with § 252, which contemplates individualized negotiations between the incumbent and each incoming carrier.

Nevertheless, the absence of liability limitations in MCI's agreement with Ameritech clearly gives MCI an advantage over other incoming carriers. But the anti-discrimination language of § 252(e) does not prevent MCI from gaining this competitive advantage. Whatever the parameters of the discrimination targeted by § 252(e), that section cannot be read to preclude interconnection agreements that give an incoming carrier a competitive advantage over other incoming carriers. n15 As noted above, this interpretation conflicts with the Act's vision of individualized negotiations between the incumbent and each incoming carrier. More importantly, Ameritech's interpretation of § 252(e) is at odds with the very purpose of the Act. The Act was designed to open local telecommunications markets to competition. *Iowa Utilities Board v. FCC, 120 F.3d 753, 816 (8th Cir. 1997)*, rev'd in part by *AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)*. In a free market, [*41] incoming local exchange carriers would compete with each other as well as with the incumbent. Yet under Ameritech's view, § 252 stifles vigorous competition between incoming carriers. The meaning of "discrimination" under § 252(e) is elusive, but that section does not prevent an incoming carrier from gaining a competitive advantage over other incoming carriers by negotiating a more favorable interconnection agreement. n16

n15 In light of the overall purpose of the Act, it is likely that Congress intended § 252(e) to forbid anticompetitive discrimination, i.e., collusive discrimination or oligopolistic behavior among the incumbent and one or more incoming carriers.

n16 Even assuming the absence of liability limitations in MCI's interconnection agreement discriminates against other incoming carriers, Ameritech does not have standing to raise the claims of other carriers.

Finally, Ameritech argues that MCI waived any challenge to the liability limitations. When MCI protested the imposition of liability [*42] limitations, the ICC declared it would not approve the agreement without the limitations. MCI was presented with a choice: it could either accept the liability limitations to gain ICC approval, or it could repeat the entire negotiation and arbitration process by refusing the limitations. Ameritech argues that because MCI elected to go forward, it waived its right to challenge the ICC's decision. Ameritech's argument lacks merit. The Act provides for judicial review of state public utilities commission decisions in § 252(e)(6). If liability limitations were improperly imposed on MCI during the approval stage, MCI's remedy

is to challenge the ICC's decision in this court It is inconsistent with the Act's procedural scheme to conclude that the ICC may deprive MCI of its right to judicial review by forcing MCI either to accept terms that were not arbitrated or to forfeit the considerable time and resources already expended. MCI did not waive its right to challenge the liability limitations.

For the foregoing reasons, the limitations on liability erroneously imposed by the ICC must be stricken.

VI. Dark Fiber

The ICC ordered Ameritech to provide MCI with access to "dark fiber" [*43] as an unbundled network element. "Dark fiber" is optical fiber that is not attached to electronics that are necessary to "illuminate" the fiber and enable it to carry telecommunications. Ameritech launches a three-pronged attack against the ICC's ruling. First, Ameritech contends the ICC had no jurisdiction to grant MCI access to dark fiber because the issue was never raised before the ICC in arbitration. Under § 252(b)(4)(A), the ICC was bound to "limit its consideration of any petition . . . (and any response thereto) to the issues set forth in the petition and the response, if any . . ." (emphasis added). Ameritech contends MCI's petition did not set forth dark fiber as an issue for arbitration. MCI responds that it raised the issue of dark fiber under the rubric of "dedicated interoffice transmission" and "shared interoffice transmission." Pl. Resp. at 3. The court need not resolve this dispute, because Ameritech plainly raised the issue of dark fiber in its response to MCI's petition. n17 See Pl Resp. at 3-4 (and citations therein). Ameritech concedes that its response "discussed" dark fiber. Def. Rep. at 7. However Ameritech contends it was forced to do so only because [*44] "it was impossible for Ameritech to be certain that the ICC was not going to address dark fiber" because it was "extremely difficult to tell from MCI's vague Petition just what issues MCI was setting forth." Id. Ameritech contends it faced a dilemma: it could decline to address dark fiber and run the risk that the ICC would erroneously decide the issue without Ameritech having a chance to present its position, or it could address the merits of the dark fiber issue and risk a later ruling that the response set forth the issue for arbitration. Id. Ameritech chose the latter course, thereby raising the dark fiber issue for arbitration under § 252(b)(4)(A). In essence, Ameritech maintains it could argue the merits of the dark fiber issue before the ICC and yet claim in this court that the issue was not before the ICC. Section 252(b)(4)(A) forbids this result.

n17 This fact distinguishes this case from *MCI Telecommunications, Inc v. Pacific Bell, 1998 U.S. Dist. LEXIS 17556,* No. C 97-0670 SI (N D. Cal. Sept. 29, 1998), in which the court found that MCI failed to raise the issue of dark fiber in an arbitration petition identical to the petition before the ICC. Ameritech claims MCI is collaterally estopped from arguing it raised the dark fiber issue in its arbitration petition. Collateral estoppel is inapplicable because here, unlike Pacific Bell, the response set forth dark fiber as an arbitration issue.

[*45]

Ameritech next argues the ICC had no authority to identify dark fiber as a network element after the Supreme Court's decision in IUB, which vacated Rule 319. Rule 319 enumerated several specific network elements that must be unbundled under the Act The Court vacated Rule 319 as inconsistent with § 251(d)(2) of the Act. Section 251(d)(2) provides:

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

The Court examined the FCC's methodology in promulgating Rule 319, and concluded that the agency had failed to properly apply the "necessary and impair" standard. *119 S. Ct. at 734-35.*

47 C.F.R. § 51.317 (hereafter, "Rule 317") is a companion to Rule 319. Rule 317 sets forth the standards state public utilities commissions are to apply in determining what network elements [*46] other than those specified in Rule 319 must be unbundled. Although IUB did not expressly vacate Rule 317, the rule purports to allow state commissions to apply the same erroneous standard that was fatal to Rule 319. Therefore, the reasoning of IUB applies with equal force to Rule 317. Ameritech contends that Rule 317 was "the sole asserted source of any State commission authority to identify network elements that must be unbundled." Def. Supp. Br. at 9 Because Rule 317 is now a dead letter, Ameritech contends the ICC had no authority to order it to unbundle dark fiber However, Rule 317 does not grant state

public utilities commissions the power to name additional elements. The rule presupposes that such power exists, and establishes the standards under which the power must be exercised. n18 Nothing in IUB suggests that state public utilities commissions lack power to name additional network elements to be unbundled.

n18 Indeed, Rule 317 is entitled "Standards for identifying network elements to be made available."

[*47]

Nevertheless, Ameritech's argument has some merit. Although state public utilities commissions have the power to name network elements to be unbundled, they must do so under the standards set forth in the Act as interpreted by the FCC. See *IUB, 119 S. Ct at 730, n 6,* and Id. at 729-33 (questioning "whether it will be the FCC or the federal courts that draw the lines to which [state commissions] must hew" and concluding that *47 U.S.C. § 201*(b) grants the FCC rulemaking authority under the Act). Those standards were set out in rule 317 which no longer governs In the absence of a standard guiding the state public utilities commission's exercise of its power, the commission might not be able to exercise its power. This court need not decide whether a state public utilities commission may anticipate FCC-promulgated standards and itself undertake to interpret the mandates of the Act. When the ICC rendered its decision on Ameritech's dark fiber, there was a standard in place, albeit the erroneous standard set out in Rule 317. Therefore, Ameritech's attack on the ICC's authority to name dark fiber as a network element is nothing more than an argument [*48] that the ICC applied the wrong standard in making its determination - precisely the argument Ameritech uses as the third prong of its attack on the ICC's decision.

In the initial briefs on the dark fiber issue, Ameritech maintained that the ICC failed to apply the necessary and impair test in any fashion, concluding its discussion after it determined dark fiber was a network element. Def. Br at 15. MCI responded that even if the ICC did not articulate a finding of impairment, the evidence provided a reasonable basis for the ICC to conclude that without access to Ameritech's dark fiber, MCI would be impaired under the standards set out in Rule 317. Pl. Resp. at 17-18. But assuming MCI is correct, the ICC applied an erroneous standard under the Act after IUB.

Recognizing this difficulty, MCI urges the court to defer its decision on the dark fiber issue until the FCC promulgates new regulations interpreting the necessary and impair standard under the doctrine of primary jurisdiction. The goals of the doctrine of primary jurisdiction include ensuring nationally uniform application of the law and promoting deference to agency expertise. *United States v Western Pacific R.R. Co , 352 U.S. 59, 65, 1 L. Ed. 2d 126, 77 S. Ct. 161 (1956).* [*49] The doctrine does not apply here, because this court can render a decision without infringing on the FCC's province. If the court were required to interpret the Act's necessary and impair requirement in order to resolve the dark fiber issue, MCI's argument might have some merit. But the court agrees with Ameritech that the ICC engaged in no analysis of necessity and impairment. The ICC's discussion focuses solely on the question whether dark fiber is a network element; it does not even make passing mention of the necessary and impair standard. Def. Br. at Ex. 2, p. 26-27. The court is not persuaded by MCI's argument that because MCI presented evidence of impairment, and because the law required the ICC to undertake a necessary and impair analysis, a finding of impairment is implicit in the ICC's decision. Pl. Resp. at 17-18. MCI's argument begs the question whether the ICC in fact considered MCI's evidence of impairment as the law required. If MCI's position were correct, there could never be a finding that a state commission failed to apply the necessary and impair test if evidence of impairment was presented. This result would be absurd.

Because the ICC failed to make any determination [*50] of necessity and impairment as required by *47 U.S.C. § 251*(d)(2), its decision compelling Ameritech to provide MCI access to dark fiber was erroneous and must be reversed.

CONCLUSION

The ICC's decision is affirmed in part and reversed in part. The ICC's decisions to adopt Ameritech's proposals regarding the time frame for providing access to local loops, to adopt Ameritech's proposed schedule for a bona fide request process, and to deny MCI the tandem interconnection rate are affirmed. The ICC's decisions to deny MCI access to shared transport without undertaking a bona fide request, to incorporate liability limitations in the interconnection agreement, and to grant MCI access to Ameritech's dark fiber are reversed.

ENTER:

Suzanne B. Conlon

United States District Judge

June 22, 1999

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused the Surrebuttal Testimony of Alphonso J. Varner filed on behalf of BellSouth Telecommunications, Inc. in Docket No. 2000-040-C to be served this April 3, 2000 by the method indicated below each addressee listed:

Russell B. Shetterly, Esquire
Haynsworth, Marion, McKay & Guerard
1201 Main Street, Suite 2400
Columbia, South Carolina 29201
(Via Facsimile)

Brad E. Mutschelknaus, Esquire
Enrico C. Soriano, Esquire
John Heitmann, Esquire
Kelly, Drye & Warren, L.L.P.
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(Via U. S. Mail)

Mr. Riley M. Murphy
Mr. James M. Falvey
E.Spire Communications, Inc.
133 National Business Parkway, Suite 200
Annapolis Junction, Maryland 20701
(Via U. S. Mail)

Florence P. Belser, Esquire
Staff Attorney
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(Via Facsimile & Hand Delivery)

Nyla M. Laney

Nyla M. Laney